Luwasa (M) Sdn Bhd v Ong Siew Oi @ Ng Siew Ooi (f)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–95 OF 1997
MOKHTAR SIDIN, TENGKU BAHARUDDIN SHAH AND ZALEHA ZAHARI JJCA
23 JULY 2008

Contract — Breach — Specific performance — Sale and purchase agreement — Clause in agreement — Undertaking by purchaser's financier required — Whether undertaking as good as payment — Whether clause complied with

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Land Law — Sale and purchase of property — Sale and purchase agreement — Undertaking by purchaser's financier — Whether unconditional undertaking

The appellant was the original purchaser of an apartment, which was subsequently sold to the respondent vide a sale and purchase agreement ('the SPA') at a purchase price of RM420,000. The respondent paid 10% deposit upon execution of the SPA. The balance purchase price of RM378,000 was payable pursuant to cll 3, 4 and 5 of the SPA. The respondent secured a loan and the respondent's financier was prepared to release the loan amount of RM300,000 upon certain undertakings and conditions being furnished by the master chargee, the appellant and the developer. Subsequently the respondent's financier's solicitors issued a letter undertaking to release the approved loan subject to the fulfillment of certain conditions. Despite repeated reminders, the appellant failed to comply with the undertaking requested and thereafter the appellant's solicitors rejected the undertaking by the respondent's financier and took the position that cl 5 had not been complied with. The appellant however took steps to encash the respondent's cheque of RM78,000, the differential sum between the balance purchase price and the loan. Subsequently, the appellant terminated the SPA and forfeited the deposit. The respondent therefore instituted proceedings against the appellant for, inter alia, an injunction restraining them from selling, transferring or assigning the apartment to any one other than the respondent, an injunction to compel the appellant to deliver vacant possession of the said property to the respondent, specific performance of the SPA and damages for breach of contract.

Held, dismissing the appeal with costs:

The appellant had clearly, by cl 5 of the SPA, agreed that full payment was deemed to be made upon depositing the differential sum and an undertaking, as opposed to actually receiving the full balance of RM378,000. Thus, the payment under cl 5 was a combination of depositing the differential sum and the respondent's financier's undertaking, which had already been done. Further cl 5 did not state that the bank is to provide an unconditional undertaking, but a lender's undertaking. The judge was therefore right in ruling that the appellant could not read into cl 5 an 'unconditional undertaking' and in concluding that a conditional undertaking sufficed, and in the circumstances of this case, that cl 5 of the SPA had been complied with (see paras 23–24).

[Bahasa Malaysia summary

Perayu merupakan pembeli asal apartmen, yang kemudiannya dijual kepada responden melalui satu perjanjian jual beli ('PJB') pada harga belian RM420,000. Responden telah membayar deposit 10% untuk penyempurnaan PJB tersebut. Baki harga belian RM378,000 perlu dibayar menurut klausa-klausa 3, 4 dan 5 PJB. Responden telah mendapatkan pinjaman dan pembiaya responden telah bersedia untuk melepaskan pinjaman sejumlah RM30,000 setelah aku janji dan syarat tertentu diberikan oleh pemegang gadaian utama, perayu dan pemaju. Berikutan itu peguamcara pembiaya responden telah mengeluarkan surat aku janji untuk melepaskan pinjaman yang diluluskan itu tertakluk kepada kepatuhan syarat-syarat tertentu. Meskipun telah diberikan peringatan beberapa kali, perayu gagal mematuhi aku janji yang dikehendaki dan oleh demikian peguamcara perayu telah menolak aku janji oleh pembiaya responden dan mengambil kedudukan bahawa kl 5 tidak dipatuhi. Perayu bagaimanapun mengambil langkah-langkah untuk menukarkan dengan wang tuani cek responden sejumlah RM78,000, jumlah perbezaan antara baki harga belian dan pinjaman tersebut. Seterusnya, perayu telah menamatkan PJB tersebut dan mengambil balik deposit. Responden oleh itu telah memulakan prosiding terhadap perayu untuk, antara lain, satu injunksi menghalang mereka daripada menjual, memindah milik atau menyerahkan apartmen tersebut kepada sesiapa kecuali responden, injunksi untuk mendesak perayu menyerah milikan kosong hartanah tersebut kepada responden, pelaksanaan spesifik PJB dan ganti rugi untuk pelanggaran kontrak.

Diputuskan, menolak rayuan dengan kos:

Perayu jelas, melalui kl 5 PJB, telah bersetuju agar bayaran penuh akan dibuat setelah mendepositkan jumlah perbezaan dan satu aku janji, dan bukan

menerima sebenarnya baki penuh RM378,000. Oleh itu, bayaran di bawah kl 5 merupakan kombinasi pendepositan jumlah perbezaan dan aku janji pembiaya responden yang telahpun dibuat. Selanjutnya kl 5 tidak menyatakan bahawa bank hendaklah memberikan aku janji tanpa syarat, tetapi satu aku janji pemberi pinjaman. Hakim oleh itu adalah betul dalam keputusannya bahawa perayu tidak boleh membaca kl 5 sebagai 'unconditional undertaking' dan membuat kesimpulan bahawa aku janji bersyarat wujud, dan dalam keadaan kes ini, kl 5 PJB telah dipatuhi (lihat perenggan 23–24).]

Notes

For a case on sale and purchase agreement, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) para 3859.

For cases on specific performance of sale and purchase agreement, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5111–5114.

Appeal from: Suit No S6–22–720 of 1990 (High Court, Kuala Lumpur)

Mark Foong (Mark Foong & Co) for the appellant.
Yau Wai Leong (Chan & Associates) for the respondent.

Zaleha Zahari JCA (delivering judgment of the court):

[1] On 13 March 2006, this appeal was dismissed with costs. Our reasons are as follows.

[2] Luwasa Malaysia Sdn Bhd, the defendant in the court below (the appellant in this appeal), is the original purchaser of an apartment known as No 1002, Desa Kudalari, Kuala Lumpur ('the said apartment') which apartment is part of a building erected on lands held under a Master Title, Certificate of Title No 7806 for Lot No 140 and Geran No 3296 for Lot No 278 all of Section 63 Town of Kuala Lumpur which lands at all material times were registered in the name of the developer of the master land, Tan & Tan Development Sdn Bhd ('the developer'). The appellant purchased the apartment from the developer vide agreement dated 8 October 1980 ('the principal agreement'). It is common ground that on the date of execution of the principal agreement no separate document of title in respect of the apartment had been issued by the relevant authorities. It is also not in issue that the appellant's rights, and interest in the apartment was subject to all charges created by the developer on the master titles (section 1.06(a) and (b) and section 7.04(a), (b) and (c)).

[3] By a loan agreement cum assignment dated 27 October 1981, in consideration of a loan granted by Malayan Banking Bhd, Jalan Tun Perak Branch ('the chargee bank') to the appellant, the appellant had assigned absolutely to the chargee bank all rights, title and interest, under the principal agreement.

[4] About nine years later the appellant sold the said apartment to the plaintiff, Ong Siew Oi @ Ng Siew Ooi, (the respondent in this appeal) vide sale and purchase agreement dated 24 July 1990 ('the SPA') at a purchase price of RM420,000. The respondent paid RM42,000 as 10% deposit upon execution of the SPA. The balance purchase price of RM378,000 was payable as provided in cll 3, 4 and 5 of the SPA which states as follows:

> 3. The balance of the Purchase Price for the said Property amounting to Malaysian Ringgit Three Hundred and Seventy Eight Thousand (M$378,000.00) only (hereinafter referred to as 'the Balance Purchase Price') shall be deposited by the Purchaser with Messrs PG Lim & Co, Advocates & Solicitors from Room 901-904, 9th Floor, Bangunan Lee Wah Bank, Medan Pasar, 50050 Kuala Lumpur (hereinafter called the vendor's solicitors) within three (3) months from the date of execution of this agreement (hereinafter referred to as 'the completion date') who shall hold the same as stakeholders.
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> 4. The vendor's solicitors are hereby authorized by the vendor to utilize the balance of the purchase price to redeem the said Property from the Bank on behalf of the vendor so as to secure a valid Receipt and Reassignment of all that the principal agreement and all the estate right title interest benefit advantage property claim and demand whatsoever of the vendor in or to the same and the said Property comprised therein to the vendor free from all encumbrances and the balance of the purchase price after deducting the redemption sum paid to the Bank shall be released by the vendor's solicitors to the vendor once the Deed of assignment to the purchaser has been perfected and delivered to the purchaser's solicitors and in any event not later than the completion date.
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> 5. If the purchaser shall have obtained a loan from a licensed finance company or a bank (hereinafter referred to as 'the Lender') and the differential sum between the balance purchase price and the loan having been deposited with the vendor's solicitors and the Lender or its solicitors have been extended and undertaking to the Vendor or the Vendor's solicitors on or before the completion date to pay the balance purchase price stated in clause 3 above shall be deemed to have complied with and satisfied the requirements of clause 3 above.

[5] Time was expressly made to be of the essence of the contract (cl 18). The sale was conditional upon obtaining the consent of the developer. The parties acknowledged that the appellant was the beneficial owner of the apartment as the individual strata title has not been issued, and that the appellant had to redeem the apartment from the chargee bank.

[6] The respondent secured a loan of RM300,000 from the Malayan Banking Bhd, Jinjang Branch ('the respondent's financier') to finance the purchase. On 13 September 1990, Messrs Choong Yik Son & Robiha, (the respondent financier's solicitors), wrote to Messrs PG Lim & Co (the appellant's solicitors), informing them that the respondent had deposited with them RM78,000 the approval of the loan by the respondent's financier, and also notified them that the respondent's financier would be prepared to release the loan amount approved of RM300,000 upon certain undertakings and confirmation being furnished by the master chargee, the appellant and the developer ie:

(a) A letter of release/disclaimer from the appellants' chargee to exclude the apartment from any foreclosure proceedings and to refund the loan sum on demand in the event that the receipt and reassignment cannot be perfected for any reason whatsoever;

(b) A letter of undertaking from the appellants to refund the loan sum on demand in the event that the deed of assignment in favour of the respondent cannot be perfected for any reason whatsoever and also to refund the same in the event that the memorandum of transfer cannot be registered in favour of the respondent upon issuance of the strata title thereof; and

(c) A letter of consent from the developer to the deed of assignment.

[7] The respondent's financier issued another letter on 15 October 1990 to the appellant's solicitors informing them that they undertook to release the approved loan sum of RM300,000 subject to the fulfillment of four conditions set out in para 3 before their undertaking can take effect ie:

(a) the purchaser/borrower has settled the difference between the purchase price and the loan sum;

(b) the vendor has forwarded us its undertaking to refund the loan sum on demand in the event the deed of assignment in favour of the purchaser/borrower cannot be perfected for any reason whatsoever and also to refund the loan sum to us on demand in the event the memorandum of transfer in favour of the purchaser/borrower cannot be registered for any reason whatsoever upon issuance of the individual strata title;

A (c) you have forwarded us the undertaking of the chargee of the master title to relinquish all their interest and rights to the property and will exclude the same from any foreclosure proceedings which may be taken against the developer and to ensure that the alienated individual/strata title is forwarded to us upon issuance and free from encumbrances;

B (d) you have forwarded us the developer's undertaking to deliver us the original issue document of the individual strata title upon issuance free from encumbrances and to further undertake to refund all monies released should the above cannot be fulfilled and should the transfer be C rejected upon registration …

[8] The appellant was not prepared and did not comply with the undertaking requested in paras 3(b) and 3(d) of letter dated 15 October 1990 D despite repeated reminders.

[9] The appellant's solicitors by their letter dated 22 October 1990 rejected the respondent's financiers undertaking and took the position that cl 5 had not been complied with. The appellant however took steps to encash the E respondent's cheque of RM78,000.

[10] Thereafter, on 8 November 1990, the appellant's solicitors issued a notice to the respondent financier's solicitors notifying them of the appellant's intention to terminate the SPA and to forfeit the deposit should the balance F purchase price not be paid by 5pm the following day, 9 November 1990. The appellant subsequently, through their solicitors, on 4 December 1990, issued a notice to the respondent terminating the SPA, that a sum of RM42,000 would be forfeited, and that the sum of RM78,000 would be reimbursed to the respondent.

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[11] On 23 November 1990, the respondent instituted proceedings against the appellant for an injunction restraining them from selling, transferring or assigning the apartment to any one other than the respondent, as well as an H injunction to compel the appellant to deliver vacant possession of the said property to the respondent. The respondent also sought an order for specific performance of the SPA, damages for breach of contract and costs.

THE JUDGE'S FINDINGS

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[12] At the High Court no oral evidence was adduced. The hearing proceeded on issues of law based on agreed facts, as well as agreed and non-agreed documents. The primary issue of law which the High Court was required to determine was:

… whether the conditional undertaking given by the lender (Maybank Bhd) is sufficient for the purpose of clause 5 of the agreement.

[13] Clause 2 of the SPA was construed by the judge to mean that the sale was conditional upon obtaining the consent of the developer. The judge was of the view that the conditions imposed by the respondent's financier were reasonable and essential, and in accordance with banking practice as the strata title to the apartment had not been issued, by reason of the existence of an existing charge, and the fact that the purchase was to be free from all encumbrances.

[14] The judge's reading of the agreement as a whole, and cl 5 in particular, permits payment of the balance purchase price through a loan from a financier. He was of the view that the court was required to take into account banking practice as well as conveyancing practice adopted by solicitors relating to such a transaction. Clause 5 provides that the respondent shall '… be deemed to have complied with and satisfied the requirements of cl 3' (ie effected full payment) when '… the differential sum (ie RM78,000) had been deposited with the vendor's solicitors and the lender or its solicitors have extended an undertaking to the vendor or the vendor's solicitors …'. Clause 5 did not require the lender to provide an unconditional undertaking, but plainly a lender's undertaking. He then held that the appellant cannot read into cl 5 an 'unconditional undertaking' and there was no reason to do so.

[15] In the circumstances of the present case he was of the view that the respondent's financier was entitled to impose the conditions which they did to protect their interest, and that the respondent could not be held responsible for her financier's action. The imposition of terms by them was beyond the respondent's control. Clause 4 would only operate upon cl 5 being complied with. In these circumstances he concluded that the conditional undertaking sufficed, and that cl 5 of the SPA had been complied with.

[16] In his written grounds the judge stated that his oral judgment of time being no longer of the essence was an oversight, but his conclusions remained intact.

[17] The judge's conclusion was that the respondent had fulfilled her part of the bargain before the completion date of 23 October 1990 and the appellant had failed to fulfill theirs. An order for specific performance of the

SPA was then issued in favour of the respondent and he further awarded damages be assessed. The judge further made an order that the respondent is permitted to set-off the balance purchase price from the damages assessed.

THE SUBMISSIONS

[18] The appellant's counsel submitted that the judge did not give sufficient attention to cll 3, 4 and 5, and had erred in finding that a conditional undertaking sufficed, that cl 5 had been complied with, and in concluding that the respondent had fulfilled her obligations under the SPA. He submitted that the judge also erred in taking into consideration banking practice with regard to loan transaction and conveyancing practice of solicitors.

[19] He pointed out the loan sum of RM300,000 referred to in letter dated 15 October 1999 was part payment of the purchase price payable to the appellant. If this sum were to be paid by the respondent's financier, it would go to the appellant's bank to discharge the charge created by the appellant. The loan amount was not meant to be paid to the developer's bank to discharge the charge created by the developer on the master titles. The developer's bank is being asked to relinquish their rights and interests under the developer's charge on the master titles, both before and after, the issuance of individual title. He argued that it was unreasonable for the respondent's financier to require an undertaking from the developer's bank to relinquish their charge on the master titles because the developer's bank required such a charge to protect the loan it gave to the developer. He submitted that it was beyond the appellant's capacity to demand such an undertaking from the developer's bank and the respondent's financier was attempting to obtain an additional right which the respondent has not acquired under the deed of assignment. He was of the view that the respondent's financier was unreasonable in demanding that the appellants, or their solicitors, provide an undertaking from the developer to deliver an original issue document of title free from encumbrances.

[20] The developer was already bound under the principal agreement to deliver to the appellant (as the original purchaser), the original issue document of title free from encumbrances. The respondent would obtain this benefit upon execution of the deed of assignment of the principal agreement and upon payment of the purchase price. According to him this undertaking was unnecessary.

[21] In reply the respondent's counsel submitted that there was no ambiguity in cl 5, and should there be any ambiguity as to the type of undertaking to be provided, it has to be interpreted by reference to

commercial reality and business common sense. He submitted that the judge had not erred in referring to such a practice. In transactions involving financing and redemption of property without title issued, it is to be expected that an undertaking to release the loan sum by the lender bank is to be conditional upon a cross undertaking to disclaim the property and to refund, if the receipt and reassignment cannot be perfected (see *Malaysian Conveyancing* Vol 3 by Judith Sihombing para 1364.1).

[22] The respondent counsel's submitted that the respondent, having placed the differential sum and the financier's undertaking, has no further tasks under the SPA. The appellant has the positive duty to act bona fide, reasonably and their best endeavours to fulfill the terms of the respondent financier's undertaking in order to perfect the respondent's performance. The conditions imposed were not onerous nor prejudicial to the appellant. The appellant has made no effort to make the request. The situation is not one where such a request was made and the bank concerned has refused despite such a request.

DECISION

[23] Our views are as follows: The appellant had clearly by cl 5 of the SPA agreed that full payment is deemed to be made upon depositing the differential sum and an undertaking, as opposed to actually receiving the full balance of RM378,000. Payment under cl 5 was thus a combination of depositing the differential sum and the respondent financier's undertaking and the appellant accepting the differential sum of RM78,000. The appellant had accordingly agreed that, by 24 October 1990, it would receive a partial payment (RM78,000) and a promise to release the loan sum from the respondent's financier. The fact that the respondent's financier would be issuing an undertaking, instead of issuing the full loan sum directly, implies that there are necessarily conditions that have to be met before the loan sum can be released.

[24] I am in agreement with the respondent's counsel that the judge had not erred in taking into account banking practice as well as conveyancing practice adopted by solicitors relating to transaction such as this. I am also in agreement with the High Court judge's interpretation of cl 5. Clause 5 clearly states that the respondent shall '… be deemed to have complied with and satisfied the requirements of cl 3' (ie effected full payment) when '… the differential sum (ie RM78,000) had been deposited with the vendor's solicitors and the lender or its solicitors have extended an undertaking to the vendor or the vendor's solicitors …'. Clause 5 did not state that the lender is to provide an unconditional undertaking, but a lender's undertaking. The judge was therefore right in ruling that the appellant cannot read into cl 5 an

A 'Unconditional Undertaking' and in concluding that a conditional undertaking sufficed, and in the circumstances of this case, that cl 5 of the SPA had been complied with.

B **[25]** For the reasons aforesaid the appeal was dismissed with costs. The deposit to respondent to account of taxed costs.

Appeal dismissed with costs.

C Reported by Augustine Soosay

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